(3)

No. 03-985

Supreme Court, U.S.
FILED
MAR 12 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LONNELL BREWER,

Petitioner,

v.

BOARD OF TRUSTEES OF UNIVERSITY OF ILLINOIS, and KERRIN THOMPSON, L. DENISE HENDRICKS, WALLACE HENDRICKS, and PETER FEUILLE in their Official and Individual Capacities,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois Fourth Judicial District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD P. KLAUS
HEYL, ROYSTER, VOELKER & ALLEN
102 E. Main St. – Suite 300
P.O. Box 129
Urbana, IL 61803-0129
(217) 344-0060 Phone
(217) 344-9295 Fax

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether Illinois courts discriminate against federal causes of action.

2. Whether the State of Illinois had waived its Eleventh Amendment immunity and had consented to being sued under the Americans with Disabilities Act.

LIST OF PARTIES

As indicated in the Petition for Writ of Certiorari, there are no parties to this proceeding that do not appear in the case caption. However, as set forth in this brief, the individual Respondents, in their individual capacities, are not proper parties.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions	1
Statement of the Case	4
Argument	6
Conclusion	14

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240 (1999) 10, 11, 12

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) 10

Brown v. Gerdes, 321 U.S. 178, 88 L. Ed. 659, 666-67, 64 S. Ct. 487 (1944) 11

Cannon v. University of Health Sciences/Chicago Medical School, 710 F.2d 351 (7th Cir. 1983) 7

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 6

Donnelly v. Yellow Freight System, Inc., 874 F.2d 402 (7th Cir. 1989) 11

Howlett v. Rose, 496 U.S. 356 (1990) ..... *passim*

Kaimowitz v. Board of Trustees of the University of Illinois, 951 F.2d 765 (7th Cir. 1991) 7

Kroll v. Board of Trustees of the University of Illinois, 934 F.2d 904 (7th Cir. 1991) 7

STATE CASES

Brewer v. Board of Trustees of the University of Illinois, 339 Ill. App. 3d 1074 (4th Dist. 2003) 1, 8, 10, 13

Cooper v. Illinois State University, 331 Ill. App. 3d 1094 (4th Dist. 2002) 7, 11, 13

Faulkner-King v. Wicks, 226 Ill. App. 3d 962 (4th Dist. 1992), *appeal denied*, 146 Ill. 2d 626 (1992), *cert. denied*, 507 U.S. 960 (1993) 9, 11, 12, 13

TABLE OF AUTHORITIES – Continued

Page

Maksimovic v. Tsogalis, 177 Ill. 2d 511, 687 N.E.2d 21, 227 Ill. Dec. 98 (1997) 9

Village of Maywood Board of Fire & Police Commissioners v. Department of Human Rights, 296 Ill. App. 3d 570 (1st. Dist.), *appeal denied*, 179 Ill. 2d 626 (1998) 13

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES

Supremacy Clause, U.S.C.A. Const. art. VI, cl.2 2

Eleventh Amendment, U.S.C.A. Const. amend. XI 2, 5, 8

28 U.S.C. § 1257 1

STATE CONSTITUTIONAL PROVISIONS AND STATUTES

Ill. Const. 1970, art. XIII, § 4 7

State Lawsuit Immunity Act, 745 ILCS 5/1 (West 2000) 2

State Lawsuit Immunity Act, 745 ILCS 5/1.5 ..... 3, 14

Illinois Human Rights Act, 775 ILCS 5/8-111(C)(West 2000) 4, 9, 10

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Fourth District, is set forth at *Brewer v. Board of Trustees of the University of Illinois*, 339 Ill. App. 3d 1074 (4th Dist. 2003) (Petitioner's App. C). The denial of the petition for leave to appeal by the Illinois Supreme Court is set forth at *Brewer v. Board of Trustees of the University of Illinois*, 2003 Ill. LEXIS 2153 (2003) (Petitioner's App. F). The amended judgment of the Circuit Court of Champaign County, Illinois is not published. (Petitioner's App. B).

STATEMENT OF JURISDICTION

The Appellate Court of Illinois, Fourth District, entered its judgment on June 17, 2003. No petition for rehearing was filed. The Supreme Court of Illinois denied the Petition for Appeal as a Matter of Right or Leave to Appeal on October 7, 2003.

Respondents agree that Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SUPREMACY CLAUSE

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any

Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S.C.A. Const. art. VI, cl. 2.

ELEVENTH AMENDMENT

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S.C.A. Const. amend. XI.

STATE LAWSUIT IMMUNITY ACT

Sec. 1. Except as provided in the Illinois Public Labor Relations Act [5 ILCS 315/1 et seq.], the Court of Claims Act [705 ILCS 505/1 et seq.], and the State Officials and Employees Ethics Act, the State of Illinois shall not be made a defendant or party in any court.

745 ILCS 5/1 (2004)

Sec. 1.5. Exceptions; State employees. (a) An employee, former employee, or prospective employee of the State who is aggrieved by any conduct or action or inaction of the State that would constitute a violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq., as amended, if committed by an employer covered by that Act may bring an action under the Age Discrimination in Employment Act of 1967 against the State in State circuit court or federal court.

(b) An employee of the State who is aggrieved by any conduct or action or inaction of the State that would constitute a violation of the Fair Labor Standards Act of

1938, 29 U.S.C. 201 et seq., as amended, if committed by an employer covered by that Act may bring an action under the Fair Labor Standards Act of 1938 against the State in State circuit court or federal court.

(c) An employee, former employee, or prospective employee of the State who is aggrieved by any conduct or action or inaction of the State that would constitute a violation of the Family and Medical Leave Act, 29 U.S.C. 2601 et seq., as amended, if committed by an employer covered by that Act may bring an action under the Family and Medical Leave Act against the State in State circuit court or federal court.

(d) An employee, former employee, or prospective employee of the State who is aggrieved by any conduct or action or inaction of the State that would constitute a violation of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq., as amended, if committed by an employer covered by that Act may bring an action under the Americans with Disabilities Act of 1990 against the State in State circuit court or federal court.

(e) An employee, former employee, or prospective employee of the State who is aggrieved by any conduct or action or inaction of the State that would constitute a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., as amended, if committed by an employer covered by that Act may bring an action under Title VII of the Civil Rights Act of 1964 against the State in State circuit court or federal court.

This section is effective January 1, 2004 pursuant to Ill. Const. (1970), art. IV, § 10 and 5 ILCS 75/2

745 ILCS 5/1.5

ILLINOIS HUMAN RIGHTS ACT

§ 8-111. Court Proceedings

(C) Limitation. Except as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act.

775 ILCS 5/8-111(C)

(the Act in its entirety is set forth in Petitioner's App. D)

STATEMENT OF THE CASE

On June 10, 2002, Petitioner filed a five count complaint in the Circuit Court for the Sixth Judicial Circuit, Champaign County, Illinois. Petitioner asserts that he lost both his job and his status as a student at the University of Illinois due to alleged race discrimination, an alleged failure to accommodate his purported disability, and in alleged retaliation for his opposition to discrimination. (R. C1-13). The individual Respondents are all employees of the Board of Trustees. (R. C1-13).

Count I asserts a Title VII claim against all Respondents. Petitioner alleges that he was terminated as a result of alleged race discrimination. (R. C1-13). Count II asserts an Americans with Disabilities Act claim against the Board of Trustees and Respondents Thompson and Hendricks. Petitioner alleges that he was disabled and that the disability was not accommodated. (R. C1-13). Count III asserts a § 1983 action against the individual Respondents, and Petitioner asserts that he was discriminated against on the basis of his race. (R. C1-13). Count IV

asserts a Title VI action against all Respondents, and it is again premised upon alleged race discrimination. (R. C1-13). Finally, Count V asserts a retaliation claim against all Respondents, and the alleged retaliation is premised upon alleged discrimination and reporting of discrimination. (R. C1-13).

On September 23, 2002, the Circuit Court entered an order dismissing the complaint. (R. C62). That judgment was modified on October 21, 2002. (R. C62 and A3-A5). Respondents' Motion to Dismiss the individual Respondents from Counts I, II, and IV was granted with prejudice. (R. C62 and A3-A5). As to those counts, the individual Respondents had asserted that they were not amenable to suit under the ADA, Title VI, and Title VII. Petitioner conceded this argument, and the Court agreed. All of Respondents' other arguments were directed at the subject matter jurisdiction of the court. Petitioner did not appeal the dismissal of the individual Respondents from Counts I, II, and IV. Consequently, the individual Respondents, in their individual capacities, are not proper parties before this Court. On all other issues, the judgment was modified to reflect that the dismissal for want of subject matter jurisdiction was without prejudice.

Petitioner subsequently filed this identical case in the United States District Court for the Central District of Illinois, Urbana Division, case number 02-2204 (Respondents' Appendix pp. 1-7). On May 15, 2003, the United States District Court entered an Order dismissing several claims (Respondents' Appendix pp. 8-22). The District Court ruled that the ADA claim set forth in Count II was barred by the Eleventh Amendment. The District Court also dismissed the Section 1983 claim in Count III as time barred, and the Court also dismissed the claims against

the individual Respondents, in their individual capacities, as to the Title VII claims (Counts I and V) and the Title VI claim (Count IV). Finally, the District Court stayed the remainder of the case pursuant to the abstention doctrine set forth in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), and it remains stayed pending the resolution of this petition.

After filing the identical case in the United States District Court, Petitioner appealed the State Circuit Court's decision in the case to the Appellate Court of Illinois, Fourth District. On June 17, 2003, the Appellate Court entered an order affirming the trial court. *Brewer v. Board of Trustees of the University of Illinois*, 339 Ill. App. 3d 1074 (4th Dist. 2003). On October 7, 2003, the Illinois Supreme Court denied Petitioner's petition for appeal as a matter of right or leave to appeal. *Brewer v. Board of Trustees of the University of Illinois*, 2003 Ill. LEXIS 2153 (2003).

ARGUMENT

Illinois courts do not discriminate against federal causes of action, and this case is against the State

Petitioner's reliance on *Howlett v. Rose*, 496 U.S. 356 (1990) is completely misplaced. In *Howlett*, the question was whether a school board had a state law defense of "sovereign immunity" when it was "otherwise subject to suit in a Florida court. . . ." *Id.* at 358. The Court noted:

> As it construed the law, Florida has extended absolute immunity from suit not only to the State and its arms but also to municipalities, counties,

> and school districts who might otherwise be subject to suit under § 1983 in federal court. That holding raises the concern that the state court may be evading federal law and discriminating against federal causes of action.

Id. at 365-366. The Court held that "the Florida court's refusal to entertain one discrete category of § 1983 claims, when the court entertains similar state law actions against state defendants, violates the Supremacy Clause." *Id.* at 375.

This case is not a case involving a local public entity, nor is it a case where an Illinois court is discriminating against a discrete federal cause of action. This is a case against an arm of the State of Illinois. The Seventh Circuit has repeatedly recognized that the Board of Trustees is an arm of the State of Illinois, and as such, it is entitled to the sovereign immunity protections of the Eleventh Amendment. *Cannon v. University of Health Sciences/Chicago Medical School*, 710 F.2d 351, 356-357 (7th Cir. 1983); *Kroll v. Board of Trustees of the University of Illinois*, 934 F.2d 904, 906-907 (7th Cir. 1991); *Kaimowitz v. Board of Trustees of the University of Illinois*, 951 F.2d 765, 767-768 (7th Cir. 1991).

As an arm of the State, the Board of Trustees is not amenable to suit in state court for "similar state law actions." As the Illinois Appellate Court noted in this case:

> As we explained in *Cooper*, 331 Ill. App. 3d at 1097, 772 N.E.2d at 398, the Illinois Constitution of 1970 abolished sovereign immunity but allowed the General Assembly to reinstate it. Ill. Const. 1970, art. XIII, § 4. The General Assembly reinstated sovereign immunity by enacting the *State Lawsuit Immunity Act* (Immunity Act),

> which provides: "Except as provided in the []Illinois Public Labor Relations Act[] [*5 ILCS 315/1 through 27* (West 2000)], * * * or except as provided in [the Court of Claims Act (*705 ILCS 505/1 through 29* (West 2000))], * * * the State of Illinois shall not be made a defendant or party in any court." (Emphasis added.) *745 ILCS 5/1* (West 2000).

Brewer v. Board of Trustees of the University of Illinois, 339 Ill. App. 3d 1074, 1079 (4th Dist. 2003). With the interplay between the Eleventh Amendment, the State Lawsuit Immunity Act, and the Illinois Human Rights Act, the State is not subject to such a suit in the Circuit Court, whether the basis of the suit derives from state or federal law.

The Illinois Appellate Court correctly recognized these fundamental distinctions:

> For two reasons, *Howlett* is distinguishable from the present case. First, the school board in *Howlett* was a local governmental entity, not an arm of the state, and, therefore, under federal law, it did not partake of Florida's sovereign immunity. *Howlett*, 496 U.S. at 365-66, 110 L. Ed. 2d at 346, 110 S. Ct. at 2437. In the present case, the Board is an arm of the State, not a local governmental entity, and has sovereign immunity. *Board of Trustees of the University of Illinois*, 293 Ill. App. 3d at 901, 689 N.E.2d at 127.
>
> Second, under Florida's own laws, Florida courts had jurisdiction over section 1983 claims. *Howlett*, 496 U.S. at 380, 110 L. Ed. 2d at 356, 110 S. Ct. at 2445. The Supreme Court explained:

"When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim. [Citations.] The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the state create a court competent to hear the case in which the federal claim is presented. The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' [H. Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954); citations.] The states thus have great latitude to establish the structure and jurisdiction of their own courts." (Emphases added.) *Howlett*, 496 U.S. at 372, 110 L. Ed. 2d at 350-51, 110 S. Ct. at 2440-41.

Illinois courts have no jurisdiction over plaintiff's claims, regardless of whether he couches them in a state statute or federal statute, because they are "inextricably linked" to alleged civil rights violations. See *Maksimovic v. Tsogalis*, 177 Ill. 2d 511, 514, 687 N.E.2d 21, 22, 227 Ill. Dec. 98 (1997); 775 ILCS 5/8-111(C) (West 2000). Federal law must take Illinois courts as it finds them. "Congress can utilize state courts to enforce federal rights, but it must do so subject to all conditions which the state court imposes on other litigants." *Faulkner-King*, 226 Ill. App. 3d at 970, 590 N.E.2d at 518. Illinois does not "discriminate against federal causes of action."

(*Howlett*, 496 U.S. at 366, 110 L. Ed. 2d at 346, 110 S. Ct. at 2437); its courts do not Adjudicate claims of discrimination arising from state law,

> either – to the extent those claims are "the subjects of * * * alleged civil rights violations." 775 ILCS 5/8-111(C) (West 2000).

Brewer v. Board of Trustees of the University of Illinois, 339 Ill. App. 3d 1074, 1082-1083 (4th Dist. 2003).

This Court has held that the States are not "persons" subject to suit under § 1983, and therefore, a State cannot be sued in state or federal court under § 1983. *Howlett v. Rose*, 496 U.S. 356, 376 (1990). Petitioner's Supremacy Clause argument is seemingly directed to his ADA claim. This Court has held that Congress did not properly abrogate the States' sovereign immunity in enacting the ADA. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 374 (2001). Consequently, the Eleventh Amendment bars ADA suits brought by private individuals against the States. *Id.* Petitioner cannot evade the Eleventh Amendment by filing suit in a State's own courts; the Supreme Court has explicitly held that the Eleventh Amendment also bars such an action. *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 2269 (1999). Since the Board of Trustees is an arm of the State, the Eleventh Amendment bars the ADA claim.

Petitioner asserts that the Illinois Human Rights Act violates the Supremacy Clause, and he should be able to bring his ADA claim in State Circuit Court, as opposed to the Illinois Human Rights Commission. However, as set forth in the Illinois Appellate Court's opinion in this case, there is no discrimination against federal causes of action in requiring Petitioner to repair to the Illinois Human Rights Commission, as similar causes of action premised upon state law also must be brought before the Illinois Human Rights Commission.

Petitioner makes the same argument, citing the same cases, that was rejected by the Illinois Appellate Court in *Faulkner-King v. Wicks*, 226 Ill. App. 3d 962, 970-971 (4th Dist. 1992), *appeal denied*, 146 Ill. 2d 626 (1992), *cert. denied*, 507 U.S. 960 (1993). Like the plaintiff in *Faulkner-King*, Plaintiff relies primarily upon *Donnelly v. Yellow Freight System, Inc.*, 874 F.2d 402 (7th Cir. 1989) and *Howlett v. Rose*, 496 U.S. 356 (1990). In specifically responding to those cases, the Illinois Appellate Court stated:

> The United States Congress cannot require circuit courts to hear certain disputes. Congress can utilize State courts to enforce Federal rights, but it must do so subject to all conditions which the State court imposes on other litigants. (*Brown v. Gerdes* (1944), 321 U.S. 178, 190, 88 L. Ed. 659, 666-67, 64 S. Ct. 487, 493.) Although circuit courts are courts of general jurisdiction, the legislature, by authority of the State Constitution, has restricted that jurisdiction when the claim involves a controversy covered by the Act. Courts have consistently ruled the Act is the exclusive source of a remedy for an employment-discrimination claim. Circuit courts cannot be compelled to accept such cases under the guise of Federal authority.

Faulkner-King v. Wicks, 226 Ill. App. 3d 962, 970-971 (4th Dist. 1992). The Illinois Appellate Court reaffirmed this holding just last summer in *Cooper v. Illinois State University*, 331 Ill. App. 3d 1094 (4th Dist. 2002).

The Illinois Appellate Court's holdings in *Faulkner-King* and *Cooper*, in the context of suits against the State, are supported by this Court's ruling in *Alden v. Maine*, 527 U.S. 706 (1999). In *Alden*, a group of probation officers

filed suit against their employer, the State of Maine, under the federal Fair Labor Standards Act. *Id.* at 711-712. The case was first filed in federal court, and that suit was dismissed pursuant to the Eleventh Amendment. *Id.* The probation officers re-filed the case in state court. *Id.* The state trial court dismissed the case on the basis of sovereign immunity, and the Maine Supreme Court affirmed the dismissal. *Id.*

The Supreme Court affirmed the Maine Supreme Court and stated:

> In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.

Id. at 754. It is interesting to note that the *Alden* Court specifically distinguished the *Howlett* case upon which Petitioner places so much reliance; "[t]he decision did not address the question of Congress' power to compel a state court to entertain an action against a nonconsenting state." *Id.* at 740. With respect to federal legislation enacted under Article I, the States are sovereignly immune from suits brought in their own courts by individuals under such legislation, unless and to the extent that the States consent to suit. *Id.* at 755. It certainly follows that the States have the authority to tailor that consent, since as a sovereign they need not consent at all.

As the Illinois Appellate Court first made clear in *Faulkner-King*, there is nothing unconstitutional with respect to the scheme of the Illinois Human Rights Act. *Alden* merely reinforces the logic of that holding with respect to the State.

At the time this case was filed, the State had not consented

Petitioner also argues that the State of Illinois has consented to be sued under the ADA in the State's courts of general jurisdiction. That argument was squarely rejected by the Illinois Appellate Court in *Cooper v. Illinois State University*, 331 Ill. App. 3d 1094 (4th Dist. 2002). With this case, the Illinois Appellate Court has ruled three times that those types of claims must be brought before the Illinois Department of Human Rights and the Illinois Human Rights Commission. *Cooper v. Illinois State University*, 331 Ill. App. 3d 1094, 1100 (4th Dist. 2002); *Faulkner-King v. Wicks*, 226 Ill. App. 3d 962, 970 (4th Dist. 1992), *appeal denied*, 146 Ill. 2d 626 (1992), *cert. denied*, 507 U.S. 960 (1993); *Brewer v. Board of Trustees of the University of Illinois*, 339 Ill. App. 3d 1074, 1078 (4th Dist. 2003).

No rational reading of *Cooper* or *Faulkner-King* leads to the conclusion argued by Petitioner. Inexplicably, Petitioner argues that *Cooper* stands for the proposition that the State has consented to suit in its courts of general jurisdiction. The exact opposite is true. The *Cooper* court stated that "we adhere to *Faulkner-King*," and the Illinois Appellate Court affirmed the trial court's dismissal of the case because of sovereign immunity principles. *Id.* at 1100. Plaintiff misunderstands the State's consent to suit; that consent, as discussed in *Faulkner-King*, *Cooper*, and *Brewer*, requires that these suits be brought only before the Illinois Human Rights Commission. *Id.* at 1097-1099. The Commission is the "exclusive source for redress of civil rights violations." *Id. quoting Village of Maywood Board of Fire & Police Commissioners v. Department of Human*

Rights, 296 Ill. App. 3d 570, 581 (1st. Dist.), *appeal denied*, 179 Ill. 2d 626 (1998).

It is both ironic and fatal to Petitioner's consent argument that, during the pendency of this case, the State of Illinois did consent to ADA cases being brought by state employees in circuit court or federal court, effective January 1, 2004. 745 ILCS 5/1.5. The Illinois General Assembly specifically consented by passing that statute, and the Illinois General Assembly selected the effective date. That statute is clear evidence that the State had not consented to suit prior to January 1, 2004.

CONCLUSION

WHEREFORE, Respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

Board of Trustees of the University of Illinois, Kerrin Thompson, Denise Hendricks, Wallace Hendricks and Peter Feuille, Respondents

RICHARD P. KLAUS
HEYL, ROYSTER, VOELKER & ALLEN

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

LONNELL BREWER,	)	
Plaintiff,	)	
v.	)	
BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, and KERRIN THOMPSON, L. DENISE HENDRICKS, WALLACE HENDRICKS, and PETER FEUILLE, in their individual capacities,	)	**Case No. 02-2204**
Defendants.	)	

ORDER

(Filed May 15, 2003)

In September 2002, Plaintiff, Lonnell Brewer, filed a Complaint (#1), against Defendants Board of Trustees of the University of Illinois, Kerrin Thompson, L. Denise Hendricks, Wallace Hendricks, and Peter Feuille, alleging discrimination in employment and violation of his constitutional and statutory rights in connection with his education. Federal jurisdiction is based on federal question under 28 U.S.C. § 1331. In January 2003, Defendants filed a Motion To Abstain or in the Alternative Dismiss (#6). After reviewing the parties' pleadings and memoranda, this Court **GRANTS** Defendants' Motion To Abstain or in the Alternative Dismiss (#6).

I. Background

The following background is taken from the complaint. Plaintiff is an African-American male with a learning disability that substantially impairs one or more major life activities. He was employed at the University's Personnel Services Office (hereinafter "PSO") as a research assistant from August 1997 through April 1998. He was enrolled in the master's degree program in the University's Institute of Labor and Industrial Relations (hereinafter "ILIR") from fall semester 1997 through June 18, 1998.

Defendant Board of Trustees is the University's governing body. At relevant times, Defendant Denise Hendricks was director of PSO and Defendant Thompson was special assistant to the director of PSO and Plaintiff's supervisor. Defendant Wallace Hendricks was a professor at the ILIR and Defendant Feuille was director of the ILIR. Plaintiff is suing the individual Defendants in both their individual and official capacities.

Plaintiff's complaint consists of five counts, as follows: (1) Count I, against all Defendants, alleges race discrimination pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*); (2) Count II alleges that Defendants Board of Trustees, Thompson, and Hendricks violated the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*) (hereinafter "ADA"); (3) Count III alleges that Defendants Thompson, Denise Hendricks, Wallace Hendricks, and Feuille violated Plaintiffs' constitutional and statutory rights; (4) Count IV, against all Defendants, alleges a violation of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d, *et seq.*,); and (5) Count V, against all Defendants, alleges retaliation.

In June 2002, before filing this suit, Plaintiff filed an identical complaint in state court. (#1, ¶ 18.) The circuit court dismissed the complaint for lack of jurisdiction. Plaintiff appealed and the case is currently pending at the appellate level (Case No. 4 02 0885). (#1, ¶ 18.)

II. Standard of Review for Motion To Dismiss

The purpose of a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). When considering a motion to dismiss, the Court must accept all well-pleaded factual allegations in the claim as true, and draw all reasonable inferences in favor of the nonmoving party. *Gutierrez v. Peters*, 111 F.3d 1364, 1368-69 (7th Cir. 1997). The Court should dismiss the claim only if the nonmoving party cannot prove any set of facts consistent with the allegations of the complaint that would entitle him to relief. *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1319-20 (7th Cir. 1997).

III. Analysis

Defendants argue that the Court should stay this case under the *Colorado River* abstention doctrine. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). In addition, Defendants contend that the Court should dismiss certain claims for the following reasons: (1) the Eleventh Amendment bars the ADA claim; (2) there is no basis for individual liability under Title VII, Title VI, or the ADA; and (3) the statute of limitations bars the Title VI and Title VII claims brought pursuant to Section 1983.

A. Motion To Dismiss

Plaintiff concedes that the Eleventh Amendment bars his ADA claim and will amend his complaint to eliminate that claim. (Plaintiff's Memorandum in Opposition to Defendants' Motion To Abstain or in the Alternative Dismiss, #9, p. 4.) Plaintiff also concedes that there is no basis for individual liability under Title VII and Title VI. (#9, p. 4.) Finally, Plaintiff's counsel has acknowledged that she has not responded to the argument that the statute of limitations bars the Section 1983 claim. As a result, the Court dismisses those claims.

B. Motion To Abstain

Defendants argue that the Court should abstain from exercising jurisdiction over the suit because the same matter is pending in state court.

When parallel cases in federal court and state courts cover the same issues, a district court may stay federal proceedings when exceptional circumstances exist. *Interstate Material Corp. v. City of Chicago*, 847 F.2d 1285, 1287 (7th Cir. 1988). The Court's first step is to determine whether the state and federal proceedings are parallel, that is, whether they involve substantially the same parties litigating substantially the same issues. *See Administrative Committee v. Gauf*, 188 F.3d 767, 772 (7th Cir. 1999). In this case, Plaintiff's complaint acknowledges that he filed an identical complaint in state court (Case No. 02 L 128). (#1, ¶ 18.) Thus, the two suits are clearly parallel.

However, abstention from the exercise of federal jurisdiction is the exception, not the rule. *Colorado River*,

424 U.S. at 813; *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, No. 98 C 0761, 1998 WL 698900, *3 (N.D. Ill. Oct. 2, 1998). The Court must balance the following factors to determine whether exceptional circumstances warrant abstention: (1) whether the state or federal court has assumed jurisdiction over property; (2) the geographical inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained by each forum; (5) the source of governing law; (6) the adequacy of the state court action to protect the rights of federal plaintiffs; (7) the relative progress of the state and federal proceedings; (8) the presence or absence of concurrent jurisdiction; and (9) the vexatious or contrived nature of the federal claim. *Id.*; *see Colorado River*, 424 U.S. at 818; *Caminiti & Iatarola, Ltd. v. Behnke Warehousing, Inc.*, 962 F.2d 698, 701 (7th Cir. 1992).

Defendants argue that abstention is in order for the following reason: (1) the desirability of avoiding piecemeal litigation; (2) the state court case was filed first; (3) the state court case has progressed to the appellate level; and (4) the filing of the ADA claim was vexatious.

Plaintiff argues that the balancing test fails to support abstention because (1) it is very doubtful that the state litigation will be an adequate vehicle for resolution of all issues; (2) no discovery has been conducted in the state forum, thus, Defendants have suffered little burden; and (3) further delay will substantially prejudice Plaintiff due to potential loss of critical documents and witness testimony.

After considering the factors in light of the allegations in this case and the arguments of both parties, the Court

concludes that the following factors are essentially neutral: (1) whether the state or federal court has assumed jurisdiction over property; (2) the geographical inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; and (4) the presence or absence of concurrent jurisdiction. In addition, the Court concludes that Plaintiff's federal claims are not vexatious or contrived.

Notwithstanding that Plaintiff's claims are based on federal law, which weighs slightly on the side of a federal forum, the Court has no doubt that the state court is capable of resolving all disputes. Similarly, the Court concludes that the state court action will adequately protect Plaintiff's rights. On the other hand, the factors involving the order in which jurisdiction was obtained by the two courts and the relative progress of the state and federal proceedings weigh in favor of deferring to the state court because Plaintiff filed in state court first and that case is now awaiting appellate review.

Overall, the balancing process favors deferring to the state court. However, what makes this situation "exceptional" and what ultimately convinced the Court that abstention is appropriate here is the timing of Plaintiff's filings. Initially, he chose to file in state court. Only after receiving an unfavorable ruling in that forum did he elect to file the same suit in federal court. To refrain from abstaining would appear to reward forum shopping. Therefore, the Court will abstain in deference to the state court's decision on appeal.

The Seventh Circuit has consistently held that a stay is the appropriate procedural mechanism for a district court to employ when deferring to a parallel state court

proceeding under the *Colorado River* doctrine. *See Lumen Construction, Inc. v. Brant Construction Co., Inc.*, 780 F.2d 691, 698 (7th Cir. 1986). Accordingly, the Court stays this case pending resolution of the state case.

IV. Summary

For the reasons set forth above, this Court **GRANTS** Defendants' motion to dismiss as to the ADA claim in Count II, the Section 1983 claim in Count III, and the claims against Defendants in their individual capacities in the Title VII (Counts I and V) and Title VI (Count IV) claims. In addition, the Court **GRANTS** the Motion to Abstain (#6). This case is stayed pending the outcome of the parallel state court case.

ENTERED this 15th day of May, 2003.

/s/ David G. Bernthal
DAVID G. BERNTHAL
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA/DANVILLE DIVISION

LONNELL BREWER	)	
Plaintiff,	)	
vs.	)	**CASE NO. 02-2204**
BOARD OF TRUSTEES OF UNIVERSITY OF ILLINOIS	)	
AND	)	**JURY TRIAL DEMANDED**
KERRIN THOMPSON, L. DENISE HENDRICKS, WALLACE HENDRICKS, PETER FEUILLE, In their Individual Capacities	)	
Defendants.	)	

COMPLAINT

(Filed Sep. 28, 2002)

COMES NOW, Plaintiff, Lonnell Brewer, (hereinafter referred to as "Plaintiff") by and through his attorney, Joanna C. Fryer, for his Complaint against Defendants, The Board of Trustees of the University of Illinois (hereinafter referred to as "the University"), Kerrin Thompson, (hereinafter referred to as "Thompson"), L. Denise Hendricks (hereinafter "Denise Hendricks"), Wallace Hendricks (hereinafter referred to as "Professor Hendricks"), and Peter Feuille (hereinafter referred to as "Feuille") states to the Court as follows:

JURISDICTION AND VENUE

1. This is an action against Defendants for discrimination in Plaintiff's employment and education at Defendant University in violation of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000d, et seq., Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, et seq, and 42 U.S.C. Section 1983.

2. Jurisdiction of this Court is proper pursuant to the above referenced Acts and statutes, and 28 U.S.C. 1331.

3. This is the county in which Defendant University has its principal office, and in which, upon information and belief, one or more individual defendants reside. In addition, this is the county in which a substantial part of the events or omissions giving rise to the claim occurred. Therefore venue is proper pursuant to 28 U.S.C. 1391(b).

PARTIES

4. Plaintiff is an African-American male with a learning disability which substantially impairs one or more major life activities including, but not limited to, reading and other tasks relating to cognitive processing.

5. Plaintiff was employed at Defendant University's Personnel Services Office, University of Illinois, Urbana-Champaign as a Research Assistant to Personnel Services from August 29, 1997 through April 22, 1998.

6. Plaintiff was enrolled in Defendant University's Master's Degree program in the Institute of Labor and Industrial Relations ("ILIR") from the beginning of the fall semester, 1997 through June 18, 1998.

7. Defendant Board of Trustees of the University of Illinois is the governing body of the University of Illinois. The events described herein occurred at the Urbana-Champaign campus of Defendant University.

8. Defendant Thompson was, at all times relevant hereto, the Special Assistant to the Director of Personnel Services Office ("PSO") and Plaintiff's immediate supervisor while Plaintiff was employed at the PSO.

9. Defendant Denise Hendricks was, at all times relevant hereto, the Assistant Vice President of Human Resources, Associate Vice Chancellor for Administrative Affairs and Director of the PSO.

10. Defendant Professor Hendricks was, at all times relevant hereto, a Professor at Defendant University in the ILIR.

11. Defendant Feuille was, at all times relevant hereto, a Professor at Defendant University and the Director of the ILIR.

12. This action is brought against the individually named Defendants in their official and individual capacities.

GENERAL ALLEGATIONS COMMON TO ALL COUNTS

13. Defendant University employed more than twenty (20) people at all times relevant hereto, and is an "employer" within the meaning of Title VII and the ADA.

14. At all times relevant hereto, the individually named defendants were acting under color of state law.

15. Plaintiff filed a timely charge of race and disability discrimination with the Equal Employment Opportunity Commission. ("EEOC").

16. Plaintiff's retaliation claims are reasonably related to the allegations contained in the EEOC Charge of Discrimination.

17. Plaintiff received his Notice of Right to Sue from the EEOC on or about March 19, 2002.

18. Plaintiff filed an identical Complaint in Illinois state court (Circuit Court of Champaign County, Illinois, Case No. 02 L 128) within ninety (90) days of receiving his Notice of Right to Sue. Defendants filed a Motion to Dismiss in this matter which was heard by the state court on September 23, 2002. The state court issued an immediate ruling which is not yet final, dismissing the state court Complaint for lack of jurisdiction.

19. The above-referenced ninety-day period is tolled while the state court proceeding is pending.

20. In the event that the Court determines that the ninety-day period is not so tolled, plaintiff is entitled to equitable tolling for the following reasons:

    a. The EEOC determined that there was probable cause to find that disability discrimination had occurred in this case;

    b. Due to sovereign immunity issues, plaintiff was compelled to bring the ADA claim referenced below in state court;

    c. As the facts set forth below demonstrate, plaintiff's ADA claim is inextricably intertwined with plaintiff's additional federal claims. Accordingly, plaintiff was compelled to bring all claims in a single forum;

d. Illinois courts, including the state court in which plaintiff's original complaint was filed, take the position that the Illinois Human Rights Act pre-empts all civil rights actions, even those based on federal law, and that state courts do not have jurisdiction to hear federal civil rights claims of any kind. This position is in direct contradiction to federal case law directly on point and is, in fact, violation of the Supremacy Clause.

e. This action was filed promptly following the adverse determination by the state court.

21. Throughout the course of his employment with PSO, Plaintiff performed his job responsibilities satisfactorily or better.

22. Plaintiff was terminated from his employment with Defendant University on April 22, 1998.

23. Throughout the course of his participation in the ILIR Master's Degree program, Plaintiff's academic performance was satisfactory or better.

24. Plaintiff was terminated from the ILIR Master's Degree program on June 18, 1998.

25. Each of the individually named Defendants participated in or substantially influenced the decisions to terminate Plaintiff from his employment and from the Master's Degree program.

26. Plaintiff satisfied the requirements for obtaining his Master's Degree from Defendant University; however Defendant University has failed and refused to confer said degree to Plaintiff for the impermissible reasons described herein.

COUNT I – RACE DISCRIMINATION
TITLE VII
(ALL DEFENDANTS)

COMES NOW plaintiff, and for Count I of his Complaint against all Defendants states:

27. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 26 as if fully set forth herein.

28. During the course of his employment with Defendant University, plaintiff was subjected to continuous and ongoing acts of race discrimination from supervisors, managers and faculty of Defendant University including, but not limited to, the individually named defendants.

29. Defendants' discriminatory intent was evidenced, in part, by Defendants' continued references, direct and indirect, to Plaintiff race and interracial relationship with his fiancé, a white woman, throughout the course of his employment and Defendant Thompson's comment at the time Plaintiff was terminated that she was "done with you people" followed by the statement "I have had it with you nigger."

30. ILIR faculty and staff and the PSO frequently communicated throughout the course of Plaintiff's employment regarding Plaintiff's employment and educational status, including discussions concerning Plaintiff's termination from his employment and the Master's Degree program. Thus, ILIR faculty and staff, including Defendant Professor Hendricks and Defendant Feuille participated in adverse employment actions taken against Plaintiff, including termination.

31. Said acts and omissions were intentional and included, but were not limited to, unfavorable performance reviews, communications to ILIR faculty and

staff unfavorable to Plaintiff and detrimental to his academic career, and termination of Plaintiff's employment.

32. Defendants' conduct in discriminating against plaintiff on the basis of race in the above-referenced ongoing and continual manner was in violation of Title VII.

33. As a direct and proximate result of the above-referenced acts of discrimination, Plaintiff has suffered and continues to suffer actual damages, including lost wages and benefits, emotional distress, humiliation, loss of reputation and mental suffering.

34. As a direct result of the discriminatory acts of Defendants, Plaintiff has incurred, and will continue to incur, substantial attorney fees and costs in connection with this matter.

WHEREFORE, Plaintiff prays for judgment against Defendants:

a) for his actual damages, including back pay, front pay, and other economic benefits of employment;

b) for compensatory damages to compensate for emotional distress, humiliation, loss of reputation and mental suffering;

c) for prejudgment and post judgment interest as provided by law;

d) for his costs incurred herein, including reasonable attorney fees; and

e) for such other and further relief which the Court deems just and proper.

COUNT II – DISABILITY DISCRIMINATION FAILURE TO ACCOMMODATE UNDER THE ADA (Defendants University, Thompson and Hendricks)

COMES NOW Plaintiff and for Count II of his Complaint against Defendants University, Thompson and Denise Hendricks states:

35. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 34 as if fully set forth herein.

36. As noted above, Plaintiff has a learning disability/developmental disorder which substantially limits one or more major life activities, including reading and other tasks relating to cognitive processing. Psychologists have concluded that Plaintiff's symptoms are consistent with DSMIII-R diagnosis of Specific Developmental Disorder – Not Otherwise Specified (315.90).

37. Defendants were informed of Plaintiff's disability in writing prior to his employment, as well as informed of reasonable accommodations Plaintiff required including, but not limited to, use of special computer programs for persons with learning disabilities, additional time to complete projects and/or flexibility with regard to deadlines for completing projects.

38. At all times relevant hereto, Plaintiff was a qualified individual who, with or without reasonable accommodation, could perform the essential functions of his position within the meaning of the ADA.

39. Defendants failed to accommodate Plaintiff's disability by refusing, on numerous occasions to provide him with the above-referenced accommodations.

40. The above-described failure to accommodate was in violation of ADA.

41. As a direct and proximate result of the above-referenced acts and omissions of Defendants, Plaintiff has suffered and will continue to suffer damages, including lost wages and benefits, emotional distress, humiliation, loss of reputation and mental suffering.

42. Plaintiff has incurred and will continue to incur substantial attorney fees and costs in connection with this matter.

WHEREFORE, Plaintiff prays for judgment against Defendants:

a) for his actual damages, including back pay, front pay, and other economic benefits of employment;

b) for compensatory damages to compensate for emotional distress, humiliation, loss of reputation and mental suffering;

c) for prejudgment and post judgment interest as provided by law;

d) for his costs incurred herein, including reasonable attorney fees; and

e) for such other and further relief which the Court deems just and proper.

COUNT III – VIOLATION OF CONSTITUTIONAL AND STATUTORY RIGHTS IN VIOLATION OF 42 U.S.C. § 1983 (Defendants Named in Their Individual Capacities)

COMES NOW plaintiff, and for Count III of his Complaint against all individually-named Defendants, alleges:

43. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 42 as if fully set forth herein.

44. Plaintiff is African-American, and, therefore, a member of a protected class for purposes of § 1983.

45. Plaintiff was treated differently than similarly situated non-African American employees in that he was under constant scrutiny, both in his capacity as an employee and his capacity as a student, because he was "the first African-American in the PSO."

46. Plaintiff was subjected to disparate performance and academic standards, and ultimately terminated from both his employment and the Master's Degree program under circumstances and for alleged reasons that would not have resulted in the termination of non-African-American employees/students.

47. Defendants acted with discriminatory intent as evidenced, in part, by the circumstances and comments set forth above.

48. At all times relevant hereto, Defendants were acting under color of state law.

49. The above-referenced acts of Defendants constitute violations of clearly established constitutional rights in that said acts of race discrimination violated plaintiff's right to equal protection under the Fourteenth Amendment to the U.S. Constitution and Title VI.

50. The above-referenced acts of Defendants constitute violations of clearly established federal statutory rights in that said acts of disability discrimination violated the ADA.

51. The disability discrimination was intentional as evidenced by Defendants' adverse comments concerning Plaintiff's accommodation requests and comments that

Plaintiff "could not make it in the real world" due to his disability.

52. At the time these acts occurred, a reasonable University staff or faculty member would have understood that such acts constituted a violation of plaintiff's equal protection rights and rights under the ADA and Title VI.

53. The above-described acts of Defendants constitute disparate treatment of plaintiff as compared to similarly situated non-African-American individuals and/or non-disabled individuals, in violation of 42 U.S.C. § 1983.

54. Defendants' acts were outrageous due to their evil motive or reckless indifference to the rights of plaintiff, justifying an award of punitive damages.

55. As a result of Defendants' violation of plaintiff's constitutional and statutory rights, plaintiff has suffered and will continue to suffer damages, including lost wages and benefits, emotional distress, humiliation, loss of reputation and mental suffering.

56. As a result of Defendants' violation of plaintiff's constitutional and statutory rights, Plaintiff has incurred and will continue to incur substantial attorney fees and costs in connection with this matter.

WHEREFORE, plaintiff prays for judgment against all Defendants named in their individual capacity:

a) for his actual damages, including back pay, front pay, and other economic benefits of employment;

b) for compensatory damages to compensate for emotional distress, humiliation, loss of reputation and mental suffering;

c) for prejudgment and post judgment interest as provided by law;

d) for his costs incurred herein, including reasonable attorney fees;

e) for punitive damages; and

f) for such other and further relief which the Court deems just and proper.

COUNT IV – VIOLATION OF TITLE VI
(All Defendants)

57. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 56 as if fully set forth herein.

58. Upon information and belief, Defendant University and/or the ILIR are "programs" receiving federal financial assistance within the meaning of Title VI.

59. Pursuant to the above-referenced allegations, plaintiff was denied the benefits of and continued participation in, the program(s) on the basis of his race, in violation of Title VI.

60. As a direct and proximate result of the above-referenced acts of discrimination, Plaintiff has suffered and continues to suffer actual damages, including lost wages and benefits, emotional distress, humiliation, loss of reputation and mental suffering.

61. As a direct result of the discriminatory acts of Defendants, Plaintiff has incurred, and will continue to incur, substantial attorney fees and costs in connection with this matter.

WHEREFORE, plaintiff prays for judgment against all Defendants:

a) for his actual damages;

b) for compensatory damages to compensate for emotional distress, humiliation, loss of reputation and mental suffering;

c) for prejudgment and post judgment interest as provided by law;

d) for his costs incurred herein, including reasonable attorney fees;

e) for injunctive relief directing Defendants to confer the above-referenced Master's Degree to Plaintiff.

f) for such other and further relief which the Court deems just and proper

COUNT V – RETALIATION
(All Defendants)

62. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 61 as if fully set forth herein.

63. On or about April 15, 1998, Plaintiff complained to Defendant Denise Hendricks concerning the above-referenced acts of discrimination which preceded or occurred in conjunction with his termination from employment at the PSO, including the racially derogatory remarks of Defendant Thompson.

64. On or about April 23, 1998 Plaintiff complained to Ron Bacevich, a Labor Relations Specialist in the PSO, regarding these same acts of discrimination.

65. Shortly after making these complaints, Plaintiff was subjected to adverse actions including, but not limited to, denial of a previously approved waiver for a "Research Methods" class, Professor Michael LeRoy's refusal to supervise Plaintiff's independent study in

Employment Law, to which LeRoy had previously agreed, and termination from the Master's Degree program on June 18, 1998.

66. The proximity in time between the complaints and the above-referenced acts raises the inference of a causal connection between the protected activities and the retaliatory acts.

67. As a direct and proximate result of the above-referenced acts of discrimination, Plaintiff has suffered and continues to suffer actual damages, including lost wages and benefits, emotional distress, humiliation, loss of reputation and mental suffering.

68. As a direct result of the discriminatory acts of Defendants, Plaintiff has incurred, and will continue to incur, substantial attorney fees and costs in connection with this matter.

a) for his actual damages, including back pay, front pay, and other economic benefits of employment;

b) for compensatory damages to compensate for emotional distress, humiliation, loss of reputation and mental suffering;

c) for prejudgment and post judgment interest as provided by law;

d) for his costs incurred herein, including reasonable attorney fees;

e) for such other and further relief which the Court deems just and proper.

69. Plaintiff hereby demands trial by jury.

JOANNA C. FRYER

By /s/ Joanna C. Fryer

Joanna C. Fryer #6274352
5555 N. Sheridan #241
Chicago, IL 60640
(773) 275-7375
(773) 907-2140 (facsimile)
Attorney for Plaintiff